STATE OF MICHIGAN

COURT OF APPEALS

NADA KIMINAIA,

Plaintiff/Counter-Defendant/Appellant,

and

NAMEER KIMINAIA,

Intervening Plaintiff/Counter-Defendant,

v

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,

Defendant,

and

BANK OF AMERICA and COUNTRYWIDE HOME LOANS, INC.,

Defendants/Counter-Plaintiffs/Appellees,

and

SUNDUS SALMOU, CTC MORTGAGE BROKERS, INC., and AMERICAN PROFESSIONAL TITLE COMPANY,

Defendants.

UNPUBLISHED
December 18, 2014

No. 318597
Oakland Circuit Court
LC No. 2008-093910-CH

Before: JANSEN, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Plaintiff, Nada Kiminaia, appeals as of right the trial court's order granting summary disposition in favor of defendants Countrywide Home Loans, Inc. ("Countrywide") and Bank of America ("BOA") with respect to her claims against them. We affirm.

Plaintiff initiated a complaint against all defendants after her home was foreclosed upon by Mortgage Electronic Registration Systems (acting as nominee for Countrywide, the lender) and thereafter sold at a sheriff's sale. Countrywide ultimately obtained title to the property through a quitclaim deed from MERS. Plaintiff did not redeem the property within the requisite time period. According to plaintiff, the signatures on the mortgage and note refinancing the home, and upon which the foreclosure was based, were not hers and were, in fact, forgeries. Plaintiff asserted that defendant Sundus Salmou, an owner and agent of CTC Mortgage Brokers, Inc. falsified her information and signatures on mortgage loan documents. Plaintiff alleged fraud, violation of statutory foreclosure procedures, violation of the Federal Real Estate Settlement Procedures Act (12 USC § 2601 *et seq*.), violation of the Truth in Lending Act (15 USC §1601 *et seq*.), violation of the Fair Debt Collection Practices Act (15 USC § 1692 *et seq*.), intentional infliction of emotional distress, and slander of title and sought to quiet title to the property in her favor. Plaintiff's husband, Nameer Kiminaia, intervened as a plaintiff and filed a separate complaint against defendants alleging fraud, wrongful foreclosure/breach of contract, intentional infliction of emotional distress, and slander of title and sought to quiet title to the property in his favor as well.

Countrywide and its successor in interest, BOA, counter-sued against plaintiff and intervening plaintiff for quiet title and slander of title. These defendants/counter-plaintiffs thereafter moved for summary disposition pursuant to MCR 2.116(C)(7),(8),(9) and (10) and plaintiff and intervening plaintiff moved for judgment in their own favor, relying upon MCR 2.116(I)(2). The trial court granted summary disposition in favor of Countrywide and BOA, dismissing plaintiff's and intervening plaintiff's complaints, and finding that Countrywide and BOA were further entitled to summary disposition in their favor as to their counter-complaints against plaintiff and intervening plaintiff for slander of title and seeking quiet title. Plaintiff now appeals the trial court's dismissal of her claims against Countrywide and BOA.[1]

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). Summary disposition is appropriate under MCR 2.116(C)(7) when the undisputed facts establish that the plaintiff's claim is barred under the applicable statute of limitations. *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim as pleaded, and all factual allegations and reasonable inferences supporting the claim are taken as true. *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000).

Summary disposition should be granted under MCR 2.116(C)(9) if a defendant fails to plead a valid defense to a claim. *Village of Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000). If the defenses are "so clearly untenable as a matter of law that no factual

[1] Intervening plaintiff has not appealed the rulings.

development could possibly deny plaintiff's right to recovery" then summary disposition under this rule is proper. *Domako v Rowe*, 184 Mich App 137, 142; 457 NW2d 107 (1990)(internal quotation and citation omitted).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). When deciding a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id*. The non-moving party "may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

On appeal, plaintiff first argues that her claim for violation of the Truth in Lending Act ("TILA") is not time barred. We disagree.

The limitations period for initiating actions under the TILA is found at 15 USC 1640(e), in relevant part, as follows:

> Except as provided in the subsequent sentence, any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation or, in the case of a violation involving a private education loan (as that term is defined in section 1650(a) of this title), 1 year from the date on which the first regular payment of principal is due under the loan. Any action under this section with respect to any violation of section 1639, 1639b, or 1639c of this title may be brought in any United States district court, or in any other court of competent jurisdiction, before the end of the 3-year period beginning on the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law. An action to enforce a violation of section 1639, 1639b, 1639c, 1639d, 1639e, 1639f, 1639g, or 1639h of this title may also be brought by the appropriate State attorney general in any appropriate United States district court, or any other court of competent jurisdiction, not later than 3 years after the date on which the violation occurs . . . .

The mortgage and note at issue bear signature dates in May 2003. An alleged repayment plan agreement relative to default on the above note bears a signature date in November 2007. Plaintiff's claim concerning violations of the TILA was not brought until June 2012. It thus falls far outside both the one and three year limitation periods set forth in 15 USC §1640(e). Plaintiff's claim of TILA violations would thus be time barred.

Plaintiff argues that the statutes of limitations do not apply here because her claims in effect constitute defenses to the foreclosure sale initiated by defendants under 15 USC §1640(k). Plaintiff's argument is unavailing.

15 USC §1640(k) provides:

Defense to foreclosure

(1) In general

> Notwithstanding any other provision of law, when a creditor, assignee, or other holder of a residential mortgage loan or anyone acting on behalf of such creditor, assignee, or holder, initiates a judicial or nonjudicial foreclosure of the residential mortgage loan, or any other action to collect the debt in connection with such loan, a consumer may assert a violation by a creditor of paragraph (1) or (2) of section 1639b(c) of this title, or of section 1639c(a) of this title, as a matter of defense by recoupment or set off without regard for the time limit on a private action for damages under subsection (e).

As pointed out in *Beach v Ocwen Federal Bank*, 523 US 410, 412; 118 S Ct 1408; 140 L Ed 2d 566 (1998), under §1640(e), "a borrower may assert the right to damages 'as a matter of defense by recoupment or set-off' *in a collection action brought by the lender* even after the one year is up." (emphasis added). Courts interpreting and applying § 1640(e), have overwhelmingly held that this "exception" to the statute of limitations in the TILA relied upon by plaintiff applies only when violations of the TILA are asserted as a defense in a collection action brought by the lender, even where the plaintiff may have filed suit in response to a defendant's foreclosure efforts.

"When the debtor hales the creditor into court . . . the claim by the debtor is affirmative rather than defensive. As such, it is subject to the one- and three-year limitations provisions" of TILA. *Moor v Travelers Ins Co*, 784 F 2d 632, 634 (5th Cir, 1986). Here, plaintiff has asserted her TILA claim affirmatively, in an action for damages that she herself commenced, and not as a defense in an action brought by the lender to collect the debt.

Moreover, plaintiff did not plead, or support, a claim for recoupment or set-off, as is necessary to fall within the parameters of §1640(k). Under § 1640(k) "a consumer may assert a violation by a creditor . . . as a matter of defense by recoupment or set off without regard for the time limit on a private action for damages under subsection (e)." "In order to bring a claim for damages after the one-year limitations period has expired, plaintiff must assert her claims as a defense by recoupment in a collection action brought by the lender." *Midouin v Downey Sav & L Ass'n, FA*, 834 F Supp 2d 95, 108-09 (EDNY 2011)(internal quotation omitted). To claim recoupment under TILA, which will not be subject to the one-year limitations period, one must show that, 1) the TILA violation and the debt are products of the same transaction, 2) the claim is asserted as a defense, and 3) the main action is timely. *In re Woolaghan*, 140 BR 377, 383 (1992). Debtors cannot avoid the statute of limitations by merely calling the requested statutory damages "recoupment." *Id*.

In this matter, assuming that plaintiff would be able to satisfy the first element, she is not able to satisfy the second element of a recoupment claim. Plaintiff is not seeking to defensively reduce the sums owed to the lender in an action brought by it, but is instead seeking affirmative

relief for an independent claim. See, *Williams v Countrywide Home Loans, Inc*, 504 F Supp 2d 176, 188 (SD Tex 2007).

A "set-off claim" is "a counter demand which a defendant holds against a plaintiff, arising out of a transaction extrinsic to the plaintiff's cause of action." *Id*. at 187-188 (citation omitted). Plaintiff has not alleged any extrinsic transaction to which a set off would apply. The trial court thus properly concluded that plaintiff's TILA damages claim was time-barred under § 1640(e)'s limitations periods.

Plaintiff's arguments concerning her remaining claims all stem from her contention that her signatures on the mortgage documents were forged and, as a result, defendants could not have obtained any interest in the property at issue, nor could they have validly conveyed an interest to anyone else. However, plaintiff must still set forth the elements of her claims which are not barred by the applicable statute of limitations to proceed with such claims: intentional infliction of emotional distress, fraud and violation of statutory foreclosure proceedings.[2]

Concerning her claim for intentional infliction of emotional distress, on appeal plaintiff simply states, in conclusory fashion, that she presented evidence to indicate that the chain of title through which defendants claim an interest in her property arose through forgery and that she testified she was suffering emotional distress as a result such that the trial court erred in granting summary disposition to defendants on this issue. Because plaintiff cites no authority for her argument, we reject it as abandoned on appeal. *Etefia v Credit Technologies, Inc,* 245 Mich App 466, 471; 628 NW2d 577 (2001). A party may not merely announce its position and leave it to this Court to search for authority in order to sustain or reject the party's position, or to discover and rationalize the basis for its claims. *Mettler Walloon, LLC v Melrose Tp*, 281 Mich App 184, 220; 761 NW2d 293 (2008).

In plaintiff's claim for fraud, she alleged that she signed no note or mortgage with CTC Mortgage Broker's Inc. or Countrywide and that any funds from any such transaction went into the bank account of CTC Mortgage Broker's Inc. and Salmou. Plaintiff further alleged that defendants were aware or should have been aware of the above and conspired to defraud plaintiff by placing a lien on her home and depriving her of her property. Notably, plaintiff did not allege any specific action on the part of Countrywide or Bank of America constituting fraud.

MCR 2.112(B)(1) requires that where fraud is alleged, the circumstances constituting the fraud must be stated with particularity. As a general rule, actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. *M & D, Inc v W.B. McConkey*, 231 Mich

[2] Although plaintiff also set forth claims for quiet title, slander of title, and violation of the Fair Debt Collection Practices Act, 15 USC 1692 *et seq*. in her complaint, she has not challenged the trial court's dismissal of these claims on appeal.

App 22, 27; 585 NW2d 33 (1998). None of the above allegations appear in plaintiff's complaint with respect to Countrywide or Bank of America, let alone with any particularity. Summary disposition was thus appropriate pursuant to MCR 2.116(C)(8) on plaintiff's claim of fraud with respect to these defendants.

Plaintiff next claims that she showed an irregularity sufficient to challenge the foreclosure. Plaintiff's primary argument on appeal is that defendant's interest in the home is invalid by virtue of the fact that defendant's claimed interest in the home arose through forged document, i.e., the May 16, 2003, note executed in favor of America's Wholesale Lender, which was secured by an allegedly forged mortgage in favor of MERS, as nominee for Countrywide d/b/a America's Wholesale Lender. Plaintiff does not allege on appeal that the trial court erred in finding no irregularity with respect to the foreclosure proceedings themselves. Thus, we need not address the trial court's actual ruling. Instead, we simply determine whether as plaintiff claims, defendants could have not have obtained any interest in the property under the circumstances presented.

Plaintiff relies on *Special Prop VI v Woodruff*, 273 Mich App 586; 730 NW2d 753 (2007) and the premise that one innocently acquiring interest in property under a forged deed is in no better position than if the person acquired the interest with notice of the forgery. However, one acquiring interest based on a forged deed, and one acquiring interest based upon a foreclosure due to nonpayment of a purportedly forged mortgage are distinctly different.

In this matter, it is undisputed plaintiff resided at the property continuously. Plaintiff indicates that she had a mortgage on the property in September 2002 and avers that the purportedly forged May 2003 mortgage and note refinanced the legitimate 2002 mortgage. However, plaintiff does not contend that she paid two mortgages at the same time on the property or even that she continuously paid one mortgage (with a forged signature or not) and that the property was inappropriately foreclosed upon when she had made all payments due and owing. In fact, Countrywide provided several documents showing that plaintiff was mailed notice of default concerning late payments of the May 2003 mortgage for March and April of 2005. Apparently, those payments were made, because the next document shows that plaintiff was thereafter sent a notice of default concerning late payments for June and July of 2005. Again, the payments on the mortgage were apparently paid, as the next document shows that plaintiff's mortgage payments of November and December 2005 were late. The total due from plaintiff at that time was simply the November and December 2005 payments, indicating that the prior unpaid payments had been caught up. Several more documents show a pattern of late payments throughout 2006. Payments on a debt may serve as acknowledgment of the debt. See, *Yeiter v Knights of St. Casimir Aid Society*, 461 Mich 493, 499-500; 607 NW2d 68 (2000); *Wayne Co Social Servs Dir v Yates*, 261 Mich App 152, 156; 681 NW2d 5 (2004); *Alpena Friend of the Court ex rel Paul v Durecki*, 195 Mich App 635, 638; 491 NW2d 864 (1992).

Further, MERS foreclosed on the property and sold it at a sheriff's sale on February 19, 2008, and MERS then quit claimed the property to Countrywide on February 20, 2008. Under MCL 600.3240, a homeowner has six months to redeem a foreclosed home and a sheriff's deed does not actually become effective until the six-month redemption period has expired. See, *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 656; 575 NW2d 745 (1998). Accordingly, any interest Countrywide had in the property would not vest until after expiration

of the redemption period, or August 19, 2008. *Id*. Plaintiff made no attempt to redeem the property. Instead, plaintiff initiated this lawsuit on August 19, 2008.

Michigan does not allow "an equitable extension of the period to redeem from a statutory foreclosure sale in connection with a mortgage foreclosed by advertisement and posting of notice in the absence of a clear showing of fraud, or irregularity." *Bryan v JPMorgan Chase Bank*, 304 Mich App 708, 714; 848 NW2d 482 (2014). Importantly, not just any type of fraud will suffice. Rather, the misconduct must relate to the foreclosure procedure itself. In *Heimerdinger v Heimerdinger*, 299 Mich 149, 154; 299 NW 844 (1941), our Supreme Court stated:

> The policy of our court in construing the provisions of the statute relative to statutory foreclosure of mortgages is well expressed in *Cameron v Adams*, 31 Mich 426, where we said: []If the sale had been made under the decree of a court, the authorities cited on the argument would bear very strongly in favor of relieving complainant. Courts of equity have large powers for relief against the consequences of inevitable accident in private dealings, and may doubtless control their own process and decrees to that end. But we think there is no such power to relieve against statutory forfeitures. Where a valid legislative act has determined the conditions on which rights shall vest or be forfeited, and there has been no fraud in conducting the legal measures, no court can interpose conditions or qualifications in violation of the statute. The parties have a right to stand upon the terms of the law.

We have continued to follow this precedent. For example, in *Freeman v Wozniak*, 241 Mich App 633, 637; 617 NW2d 46 (2000), a panel of this Court held that where the foreclosure procedure was technically proper, the "plaintiff cannot argue that there was fraud, accident, or mistake . . . ." Plaintiff having not alleged that there was fraud, accident, or mistake in conducting the legal measure of the foreclosure procedure itself, when the redemption period expired on August 19, 2008, all of plaintiff's rights in and title to the property were extinguished and she lost standing to bring her claim on that date. See, *Bryan*, 304 Mich App at 714-715. The trial court thus properly dismissed plaintiff's claims.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael J. Talbot
/s/ Deborah A. Servitto